

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 20, 2006

RAYMOND WRITER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sullivan County
No. C49,428 Phyllis H. Miller, Judge

No. E2006-00770-CCA-R3-PC - Filed March 14, 2007

The Petitioner, Raymond Writer, was convicted by a Sullivan County jury of rape of a child. He was sentenced to serve twenty-five years at 100%. This Court affirmed the Petitioner's conviction on direct appeal. The Petitioner filed a petition for post-conviction relief, asserting that he received the ineffective assistance of counsel, which the trial court denied. On appeal, the Petitioner's sole issue is whether the trial court erred in determining that he received the effective assistance of counsel. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Richard A. Tate, Assistant Public Defender, Blountville, Tennessee, for the appellant, Raymond Phillip Writer.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Greeley Wells, District Attorney General; and Teresa M. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

This case arises from the rape of a four-year-old boy—the Petitioner's girlfriend's grandson. The underlying facts of the offense, as detailed by this Court on direct appeal, are as follows:

The victim,¹ who was four-years-and-eleven-months-old at the time that he reported his abuse, is the grandson of Gwen Bunnell.² The [Petitioner] had been co-habiting with Ms. Bunnell for the past nineteen years at the time of trial. The victim would frequently visit Ms. Bunnell and the [Petitioner] in their home and would often spend weekend nights with the two. The victim referred to the [Petitioner] as his “grandpa” and had a close relationship with him.

On March 20, 1998, the victim’s mother, Shannon Simms, brought the victim to his pediatrician, Dr. Mark DeMoss, for a physical that was required prior to the victim’s enrollment in kindergarten. . . . During the exam, Ms. Simms asked Dr. DeMoss for advice regarding cleaning the victim’s un-circumcised penis. Dr. DeMoss advised Ms. Simms that she should begin to slowly work back the victim’s foreskin to facilitate cleaning. Subsequent to this visit, Ms. Simms began to attempt to work the victim’s foreskin back. On one such occasion, the victim exclaimed “[d]on’t do what grandpa does.” The victim then explained to his mother what his grandfather had done to him, and Ms. Simms immediately scheduled an emergency appointment with Dr. DeMoss.

The victim met with Dr. DeMoss during an appointment on March 26, 1998. Ms. Simms informed Dr. DeMoss of the victim’s claims, and Dr. DeMoss then proceeded to question the victim. In response to Dr. DeMoss’s open-ended questions, the victim told Dr. DeMoss that while he had been at his grandparents[’] house in their bathroom, his grandfather had placed his “big” penis inside the victim’s “bottom,” meaning his rectum. The victim also recounted seeing “poop,” or stool, on the [Petitioner’s] penis after penetration. The victim described the experience as painful, indicating that it felt as if his “butt were exploding.” Dr. DeMoss then conducted a physical exam of the victim. Dr. DeMoss discovered that the victim’s outer rectal muscle opened easily, which he described as abnormal, and also discovered that the [victim’s]³ rectal area contained scar tissue, indicating repeated trauma over an extended period of time. After completing his exam, Dr. DeMoss contacted the Department of Children Services.

In response to Dr. DeMoss’s referral, a case worker from the Department of Children’s Services interviewed the victim. Subsequently, Children’s Services referred the victim’s case to Dr. John Heise, another pediatrician, who also

¹ It is the policy of this Court to refrain from mentioning the name of a child abuse victim.

² Ms. Bunnell’s name is also spelled as Brunell and Bunnel in various portions of the record. After the trial of this case took place, Ms. Bunnell married the Petitioner and was known as Mrs. Gwen Writer at the time of the post-conviction hearing.

³ The opinion on direct appeal stated that these injuries were the Petitioner’s. However, this is erroneous as the trial transcript demonstrates that the victim suffered the rectal injuries.

interviewed and examined the victim. The victim told Dr. Heise that the [Petitioner] had put his “pee pee” in the victim’s “butt,” which were the words, as Dr. Heise explained, that the victim used to refer to a penis and the buttocks area. During his physical examination of the victim, Dr. Heise discovered that the folds in the victim’s rectal muscles had been flattened, meaning that they had been stretched out and folded. Dr. Heise also noted some scar tissue on the [victim]’s rectal muscles. Dr. Heise described both of these conditions as abnormal and indicative of penetration.

The victim testified at trial. He repeated his earlier allegations of the [Petitioner’s] sexual abuse. While he identified the [Petitioner] as his abuser by name, he was unable to positively identify the [Petitioner] at trial. He was approximately seven-years-old at the time of trial and had not seen the [Petitioner] since he made these allegations, approximately two years prior to trial.

Ms. Gwen Bunnell, the [Petitioner’s] live-in girlfriend of then nineteen years, testified on the [Petitioner’s] behalf. She stated that the [Petitioner] and the victim enjoyed a very close and loving relationship and that the [Petitioner] had never had the opportunity to molest the victim. She recounted one instance, a Saturday night before she, the [Petitioner], and the victim all went to the Knoxville Zoo on a Sunday. She was so excited about the upcoming event that she did not sleep. She remained in the room where she, the [Petitioner], and the victim all slept, and she did not witness any molestation. Furthermore, she stated that the [Petitioner] had never been alone with the victim in their bathroom and therefore would not have had the opportunity to molest the victim there. Ms. Bunnell further testified that when she initially learned that the victim had named the [Petitioner] as his molester, she became angry enough to “kill him.” However, after speaking with Dr. Heise, who reportedly told her that the abuse had happened within a couple of weeks of his exam, she recognized that the [Petitioner] had not had an opportunity to molest the victim and therefore must not have been his abuser. Ms. Bunnell speculated that the victim must have identified the [Petitioner] as his perpetrator because he had been consistently persuaded to do so over a long period of time. Furthermore, as further proof of the [Petitioner’s] innocence, Ms. Bunnell testified that the [Petitioner] had never demonstrated any signs of being a child molester. In response to this last statement, the prosecutor questioned Ms. Bunnell about an incident in which the [Petitioner] admitted to her that he had digitally penetrated Ms. Simms, Ms. Bunnell’s daughter, when Ms. Simms was between the ages of eleven and fourteen. Ms. Bunnell admitted that she did have knowledge of this incident.

The [Petitioner] also testified on his own behalf. He denied having committed the instant crime and also speculated that the victim had identified him as his molester because he had been persuaded to do so.

At the close of the [Petitioner's] proof, the state introduced the rebuttal testimony of Amy Harris, the Department of Children Services caseworker who interviewed the victim. The state introduced Ms. Harris's testimony to rehabilitate the victim's testimony, which had been impeached by Ms. Bunnell's and the [Petitioner's] allegations that he had lied because he had been persuaded to do so. Ms. Harris testified that she interviewed the victim when his parents were neither present nor visible to the victim. Ms. Harris asked the victim about his doctor's visit with Dr. DeMoss, which had occurred the day before, and the victim responded that the visit was "bad news for his butt." The victim further explained that his "grandpa stuck his pee pee in his butt," and that his grandpa was "Grandpa Writer."

State v. Raymond Writer, No. E2001-01062-CCA-R3-CD, 2003 WL 21339255, *1-3 (Tenn. Crim. App., Knoxville, June 10, 2003), perm. app. denied (Tenn. Oct. 27, 2003).

Following a jury trial, the Petitioner was convicted of rape of a child. He was sentenced to serve twenty-five years in the Department of Correction at 100%. On direct appeal, this Court affirmed the Petitioner's conviction. See id. The Petitioner filed a timely pro se petition for post-conviction relief, which was later amended by counsel. He alleged that he was denied his constitutional right to the effective assistance of counsel at trial. Specifically, he asserted that his trial counsel was ineffective because (1) he was not advised of his right not to testify and "was told that he had to testify at trial"; (2) his trial counsel did not "advise witness, [Gwen Bunnell], that certain statements or comments made by her while giving testimony may 'open [the] door' to cross examination that was detrimental in trial of this cause"; and (3) his trial counsel did not "issue subpoena[s] for witnesses that they were informed of by the Petitioner . . . that . . . would have been favorable to his defense."

At the post-conviction hearing, the Petitioner testified that his trial counsel did not inform him of his Fifth Amendment right not to testify. The Petitioner stated that he elected to testify during trial because his trial counsel "told [him that he] would have to testify" He stated that his trial counsel did not prepare him for what type of questions he would be asked while testifying and stated that his trial counsel only told him that he wanted "spontaneous answers" The Petitioner stated that he had instructed his attorney that he wanted certain questions asked but that his attorney "wanted to remember everything in his head" so he did not have to "bring in a bunch of notes." The Petitioner stated that, because of this, his attorney "didn't remember the questions" that he had wanted him to ask.

With regard to witness preparation, the Petitioner testified that, to his knowledge, he was "around every time" that his trial attorneys met with his girlfriend, Ms. Gwen Bunnell. The Petitioner testified that his attorneys were aware that Ms. Bunnell's minor daughter had previously brought allegations of sexual misconduct against him. The Petitioner stated that he did not "remember any discussion" about how Ms. Bunnell should testify to avoid discussing these allegations. The Petitioner stated that his attorneys simply told them to "answer what [they] were asked."

With regard to additional character witnesses, the Petitioner testified that he had given his trial attorneys the names of his “neighbors and friends” to call as witnesses but that his trial counsel informed him that “he didn’t want to call [character] witnesses . . . in a case like this.” The Petitioner stated that his trial counsel “might” have explained to him that this was because he did not want to harm the Petitioner’s defense. The Petitioner testified that his trial counsel maintained this position even after negative character evidence in the form of prior child sexual allegations came into evidence.

In conclusion, the Petitioner testified as follows regarding the performance of his trial attorneys:

I don’t know nothing much about lawyer-ing, but I just . . . didn’t understand all the ramifications of everything that could change during trial and I thought he would understand all that and be able to . . . compensate for it and I . . . just don’t believe he did a competent job.

On cross-examination, the Petitioner admitted that he had dealt with lawyers previously in connection with his prior criminal convictions for driving under the influence, possession of marijuana, public intoxication, petty theft, burglary, and various traffic offenses. He reiterated that his attorney did not advise him of his Fifth Amendment right but testified that his attorney had told him that “he didn’t know if he needed [the Petitioner] to testify” until after Ms. Bunnell testified and mentioned her daughter’s allegations. He also stated that his attorneys were aware of Ms. Bunnell’s daughter’s allegations and that “[t]here were discussions” about how Ms. Bunnell should approach this subject while testifying. The Petitioner stated that Ms. Bunnell knew that this information could be detrimental if presented before the jury. The Petitioner also testified that the witnesses he wanted to call at trial knew both he and the victim and had seen them together, but he did not elaborate further as to precisely how they would have assisted his defense.

Sherry Ann Tribble also testified at the post-conviction hearing. Ms. Tribble was one of the potential character witnesses that his attorneys had not called to testify. Ms. Tribble testified that she was once a neighbor of the Petitioner. She testified that the Petitioner had spent time with her young children and she had never known of anything inappropriate to have happened. She also testified that she had seen the victim with the Petitioner but never saw or knew of anything inappropriate. On cross-examination, Ms. Tribble stated that she did not believe her children were ever alone with the Petitioner but the children had been with the Petitioner and Ms. Bunnell together. Ms. Tribble also admitted she was unaware that the Petitioner had used marijuana.

Ms. Rosalie Lane, another neighbor whom the Petitioner’s trial counsel did not call to testify, stated at the post-conviction hearing that she had known the Petitioner for approximately ten years. She stated that she had seen the Petitioner with the victim and had never witnessed anything inappropriate. She stated that her own grandchild had been around the Petitioner and that she had never witnessed any misconduct or questionable behavior.

Mrs. Camilla Gwen Writer, who had previously been known as Ms. Gwen Bunnell and had since married the Petitioner, also testified at the post-conviction hearing. With regard to the manner in which she was prepared for testifying at trial, Mrs. Writer stated that the trial attorneys “mentioned opening a door but he did not explain . . . what would or would not open the door.” She testified that the attorneys did not discuss with her what questions they would be asking her at trial. Mrs. Writer also testified that, even though the Petitioner told his trial attorneys that he wanted other witnesses to be called, the trial attorneys stated they “did not want any character witnesses.” She stated that the Petitioner asked the trial attorneys after she had testified whether these witnesses should be called and that the trial attorneys again responded that the Petitioner “didn’t need any character witnesses.”

Mrs. Writer further testified that the trial attorneys never discussed with the Petitioner that he had a right not to testify. She stated that she believed she was with the Petitioner “every time” that he met with his lead trial counsel. Furthermore, Mrs. Writer testified that she heard the Petitioner’s lead trial counsel tell the Petitioner, “You’re going to have to testify.”

The State presented both trial attorneys as witnesses at the post-conviction hearing. First, the lead trial counsel (hereinafter “lead counsel” or “counsel”) testified that his trial strategy was “to prove that [the Petitioner] first did not commit it by showing he had no motive to do it, no opportunity and that was the strategy that [they] went with.” Lead counsel testified that he did not tell the Petitioner that he was required to testify and that he did tell him, “[p]robably certainly on more than one occasion[,]” that he had the right not to testify. He stated that he did recommend after Ms. Bunnell’s testimony that the Petitioner testify and that the Petitioner followed his advice. When asked if the Petitioner had any “reluctance” about testifying, lead counsel replied, “None that I recall.”

Lead counsel also testified regarding counseling Ms. Bunnell and the Petitioner about Ms. Bunnell’s daughter’s prior allegations that the Petitioner committed sexual misconduct. Counsel testified that he was “very concerned” about these allegations being presented to the jury. He stated that he “discussed with her not to mention anything about the prior incident with [the Petitioner] and her daughter” because “it’s very damaging.” He testified that he and his co-counsel “went over [Ms. Bunnell’s] testimony very much” and reminded her “right before she testified not to open that door, to bring that issue up.”

Lead counsel also testified that he and his co-counsel “went over all witnesses that [the Petitioner and Ms. Bunnell] thought would be helpful or favorable” but stated that, in his opinion, “character witnesses can be . . . as damning as they can be helpful.” He stated that “one of the things that worries [him] about [character witnesses is] . . . how much they know and how much they don’t know.” Counsel testified that he was “sure” that the Petitioner was involved in these discussions regarding which witnesses would be called to testify. Counsel stated that he did not remember specifically if the Petitioner asked him to call Ms. Sherry Tribble or Ms. Rosalie Lane as character witnesses.

On cross-examination, lead counsel testified that he advised the Petitioner to testify because of the negative impact of Ms. Bunnell's testimony regarding the prior allegations of the sexual misconduct involving her minor daughter. He testified that he believed the Petitioner's own testimony would be stronger than calling other character witnesses. Counsel testified that he had discussed with the Petitioner his right not to testify. He stated that he didn't "know how many times [they had] discussed it" but that he was certain that they had discussed it and that the Petitioner knew that they were only advising him that it was "in his best interest to testify." Counsel stated, however, that he did have one of the character witnesses present at trial in case he decided that it was necessary to call her to testify, but he did not recall if she was subpoenaed.

Finally, counsel stated that the Petitioner never expressed any dissatisfaction about his handling of the case. Specifically, counsel stated that they "never had one difference of opinion the entire time." He stated that he and the Petitioner "never had any misunderstandings or communication problems or anything that I thought that we weren't on the same page on." Counsel stated that he "had no problems with . . . communicating with him or talking with him at any time." He stated that the Petitioner "was probably one of the more enjoyable clients . . . [that he has] represented." The Petitioner elected to have counsel continue to represent him on direct appeal.

The Petitioner's trial co-counsel (hereinafter "co-counsel") testified at the post-conviction hearing that he became involved with the "complicated medical issues" in the Petitioner's case. He stated that he knew "for a fact that there was [sic] discussions made about testimony or not testifying and . . . [he thought they] were all on the same page that the trial was going to proceed with the idea that [the Petitioner] was going to testify." Co-counsel stated that the Petitioner never expressed any reluctance, unwillingness, or concerns about testifying. He stated that he did not know if he and lead counsel went into "any specific detail" about the Petitioner's right not to testify but that he "believe[d] that . . . [they] talked about the fact that he didn't have to testify, that that wasn't a requirement, but that the facts of this case lent itself toward him needing to be ready to testify." On cross-examination, co-counsel stated that he did not know if he or lead counsel discussed the Petitioner's right not to testify like it would have been done "in a plea agreement . . ." He stated that, although he was not always present when lead counsel was counseling the Petitioner, that he "frankly . . . assumed that he understood that he didn't have to testify."

Co-counsel also testified that he had met with Ms. Bunnell prior to trial. He stated that he was not as involved in preparing her as a witness and that lead counsel "probably did more of that." He stated, though, that he and lead counsel "were very much aware of . . . [her daughter's sexual abuse allegations] and discussed . . . very openly . . . the problem that would cause if that particular testimony came to light during her questioning." Co-counsel testified that he could "specifically remember the last thing . . . [they] talked about in the witness room . . . was the discussion of not opening the door" to questioning regarding other sexual abuse allegations in the Petitioner's past. He stated that this was "a drilled point of the preparation and emphasis [was] made on that issue." He testified that they instructed Ms. Bunnell that, "if she made any blanket statements about . . . [the Petitioner's] character, that that could very well open the door for testimony about these prior allegations, that that would probably allow them to come in and that we definitely needed to stay

away from that.” He stated that Ms. Bunnell “absolutely” had no misunderstanding about this issue. As such, he stated that they “were hoping character wasn’t going to be an issue” and there would be no need for rehabilitating character witnesses. After Ms. Bunnell testified and did in fact open the door to character testimony, co-counsel stated that she was “awfully upset with herself”

Co-counsel testified that there was “never any inkling at all of any disagreement as to how . . . [they] were going to proceed with the case.” He stated that the Petitioner and Ms. Bunnell “were both very supportive of the strategies that . . . [they] were going to employ” He stated that he knew of no dissatisfaction “whatsoever” about their representation of the Petitioner at trial. Co-counsel testified that he also continued to represent the Petitioner on appeal.

The trial court denied the Petitioner’s petition for post-conviction relief. The findings of the post-conviction court are as follows:

The [c]ourt finds that the Petitioner failed to prove by clear and convincing evidence that his constitutional right to effective assistance of counsel . . . was violated. The [c]ourt finds that some of his allegations are completely untrue; others involve trial strategy to which the [c]ourt finds that he agreed—until he was convicted; he offered either no proof or contradictory proof to several of his allegations.

The [c]ourt accredits the testimony of [lead counsel] and [co-counsel] over that of the [Petitioner]. The Petitioner presented no witnesses who, as he alleged, would have any impact on the jury’s finding of guilt or innocence. The only witnesses he named would have been character witnesses; considering that the Petitioner had admitted to previous sexual molestation of a minor, his character was not an issue any competent attorney would have wanted to raise.

Therefore, the court finds that the decisions made by [lead counsel] and [co-counsel] were matters of trial strategy and were well within the requirements of the law. Just because the [P]etitioner got convicted does not mean he was not represented effectively.

This appeal followed.

Analysis

I. Effective Assistance of Counsel

_____The Petitioner argues on appeal that he received the ineffective assistance of counsel at trial. The trial court concluded that the Petitioner did not prove by clear and convincing evidence that he received ineffective assistance of counsel, and we conclude that the trial court did not err in its determination.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

A. Advice on Right Not to Testify

First, the Petitioner argues that his trial counsel was ineffective because he was not informed of his right not to testify. The trial court did not explicitly analyze under Strickland the Petitioner’s allegation that he was not advised on his right not to testify. However, the trial judge did generally state that she accredited the testimony of trial counsel over the Petitioner. The trial court also addressed the evidence from the post-conviction hearing on this issue as follows:

At the post-conviction hearing the Petitioner maintained that [lead counsel] never told him he had a Fifth Amendment right not to testify. He also said that before Ms Brunell [sic] testified, [counsel] said he didn't know whether the Petitioner's testimony would be needed, but after she testified, [counsel] told him he would have to testify.

[Counsel] testified that he did tell the Petitioner he had a right not to testify, that he and the Petitioner discussed the Petitioner's right not to testify and the fact that his exercise of that right could not be held against him. [Counsel] said the Petitioner agreed with the attorneys' decision to call him as a witness.

[Co-counsel] testified that the Petitioner was never told he was required to testify and that the Petitioner never expressed any reluctance to testify.

By considering these evidentiary findings along with the trial court's ultimate conclusion that the trial attorneys were more credible than the Petitioner, we conclude that the trial court implicitly determined that the Petitioner's trial counsel did not render deficient performance.

The Petitioner argues on appeal that his trial counsel did render deficient performance because he was "never informed that he did not have to testify." While the substance of the attorneys' advice was certainly disputed at the post-conviction hearing, the Petitioner simply did not present sufficient evidence to support his allegations. Our law requires that the Petitioner meet this burden of bringing forth clear and convincing evidence to support his factual claims. The Petitioner did not do so in this case. The evidence does not preponderate against the findings of the trial court. Therefore, we will not disturb the trial court's determination that the Petitioner's attorneys provided the effective assistance of counsel with regard to advising the Petitioner of his right not to testify.

B. Witness Preparation for Ms. Gwen Bunnell

Next, the Petitioner alleges that his trial attorneys rendered ineffective assistance of counsel because they did not adequately prepare Ms. Gwen Bunnell about what would "open the door" to her daughter's prior sexual misconduct allegations. The trial court did not explicitly analyze under Strickland the Petitioner's allegations that Ms. Bunnell was not properly prepared for trial. However, the trial judge did find that she accredited the testimony of counsel over the Petitioner. The trial court also addressed the evidence from the post-conviction hearing on this issue as follows:

At the post-conviction hearing, the Petitioner said he did not remember any discussion between [counsel and Ms. Bunnell] to restrict her testimony regarding his previous molestation of her daughter. He said [counsel] told them both to answer only what they were asked, but he never told them certain testimony could bring out the prior allegation against him. However, on cross-examination, the Petitioner admitted there were discussions about mentioning anything that happened with Ms

Bunnell's daughter; he acknowledged that both he and Ms Bunnell knew it was "dangerous to come out."

Ms. Bunnell also maintained that [counsel and co-counsel] didn't mention the allegation involving her daughter and never told her not to bring up anything about her daughter.

[Counsel] testified that he and [co-counsel] went over Ms Bunnell's testimony with her more than once, the last time being right before she testified. [Co-counsel] testified that it was "a drilled point of the preparation" that "if she made any statements about [the Petitioner's] character," it could open the door for testimony about the prior allegation; he did not doubt that Ms Bunnell understood the problem.

By considering these evidentiary findings along with the trial court's ultimate conclusion that the trial attorneys were more credible than the Petitioner, we conclude that the trial court implicitly determined that the Petitioner's trial counsel did not render deficient performance.

The Petitioner asserts that Ms. Bunnell was not properly instructed on what may "'open the door' to allegations of misconduct of the [Petitioner] with his stepdaughter." Although the extent to which the Petitioner's attorneys discussed the intricacies of the evidentiary rules was disputed at the post-conviction hearing, the Petitioner did not present clear and convincing evidence that counsel was deficient. Therefore, we must conclude that the trial court properly determined that the Petitioner received the effective assistance of counsel with regard to how his attorneys prepared Ms. Bunnell for her trial testimony.

C. Character Witnesses

Finally, the Petitioner argues that his trial attorneys were ineffective because they did not present other witnesses to testify that they had "been with the [Petitioner] on different occasions and . . . they had never observed any misconduct nor had there been any allegations of misconduct by the [Petitioner]." The trial court found that "the only witnesses [the Petitioner] named would have been character witnesses; considering that the Petitioner had admitted to previous sexual molestation of a minor, his character was not an issue any competent attorney would have wanted to raise." Thus, the trial court implicitly concluded that the Petitioner's attorneys were not deficient.

The Petitioner submits that the trial court erred in this ruling because the character witnesses would have testified that "their children and grandchild had been with the [Petitioner] on different occasions and that they had never observed any misconduct nor had there been any allegations of misconduct by the [Petitioner]." The Petitioner did present these witnesses at the post-conviction hearing and their testimony was consistent with the Petitioner's summarization.

The trial court found that no "competent attorney would have wanted to raise" the Petitioner's character as an issue in a case where they knew that he had admitted to sexual misconduct involving a minor. While this reasoning was sound, the Petitioner's character was

brought into question unintentionally when Ms. Bunnell “opened the door” to it. The question then becomes whether the Petitioner’s attorneys were deficient by not refuting this damaging evidence with all possible positive evidence, including statements from his neighbors that they had seen him interact with other children without any incidents. The trial court did not address this precise issue in its finding on whether the trial attorneys were deficient.

Nonetheless, we conclude that the trial attorneys’ decision not to call these character witnesses was properly within the “wide range of reasonable professional assistance” that is constitutionally permissible. See Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The Petitioner’s lead counsel opined that “character witnesses can be . . . as damning as they can be helpful” and that “one of the things that worries [him] about neighbors [is] . . . how much they know and how much they don’t know.” The Petitioner’s counsel also stated that the best defense option to refute the damaging character evidence was the Petitioner’s own testimony, which was what he recommended. Even so, counsel requested that one of the character witnesses remain in the courtroom during the trial in case she was needed. The record reflects that the trial attorneys were aware of the predicament and made an informed strategic decision not to use character witnesses to rehabilitate the Petitioner. We also conclude that the Petitioner failed to demonstrate that he was prejudiced by any such alleged deficient representation. For these reasons, we conclude that the trial court did not err by denying post-conviction relief.

Conclusion

Based upon the foregoing authorities and reasoning, we conclude that the trial court properly denied post-conviction relief. Therefore, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE